

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

STEVEN J ANDERSON
3423 IOWA 9 ST
ROCK RAPIDS IA 51246-7576

ALPHA OMEGA PUBLICATIONS INC
300 N MCKEMY AVE
CHANDLER AZ 85226

Appeal Number: 06A-UI-04665-RT
OC: 04-02-06 R: 01
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a - Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Steven J. Anderson, filed a timely appeal from an unemployment insurance decision dated April 24, 2006, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on May 17, 2006, with the claimant participating. Kathleen Brunk, Staff Accountant, participated in the hearing for the employer, Alpha Omega Publications, Inc. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant. At 4:04 p.m. on May 11, 2006, the administrative law judge spoke to the employer's witness who requested that the hearing be rescheduled because of a two-hour time difference between Iowa and Arizona, which would cause the hearing to be held at 7:00 a.m. Arizona time and the office

did not open until 7:30 a.m. Because the employer's witness could be available at 7:30 a.m., the administrative law judge agreed to start the hearing at 9:30 a.m. Iowa time but not to reschedule it otherwise. The employer's witness participated in the hearing.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a part-time customer service representative from March 21, 2005 until he was discharged on February 27, 2006. The claimant averaged 30+ hours per week. The claimant was discharged for poor attendance. On February 22, 23, and 24, 2006, the claimant was absent for personal illness. The claimant did not call in and report these absences to the employer. Rather, Sara Sprock, Manager of the Customer Service office where the claimant was employed, called the claimant on February 24, 2006 to find out what was wrong. The claimant informed her at that time that he was ill. The employer has a policy in its employee guidelines book on page 20 that requires that an employee call in and notify the employer of an absence every day of the absence. The claimant received a copy of this book and signed an acknowledgement therefore. The policy does provide that three or more consecutive absences without notifying the employer is treated as a voluntary quit but the employer, in this case, determined to discharge the claimant. The claimant came in to work on Monday, February 27, 2006 and was discharged.

The claimant was absent on February 20, 2006 for personal illness, the same illness that caused him to be absent on the days noted above. The claimant did properly report this absence. The claimant could not remember whether he had said anything about further absences. The claimant was off work the next day, February 21, 2006 and although he was still ill, he did not call the employer because he did not have to work that day. The claimant believed that because he had called in on February 20, 2006 appropriately that he did not have to call in on the days thereafter. The claimant did not recall the provisions in the employee guidelines book requiring that he call in every day. The claimant had a few other absences for days off or other reasons that were excused in advance. The claimant had no other absences that were not unexcused. The claimant received no warnings or disciplines for his attendance.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
 - a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on February 27, 2006. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). It is well established that the employer has the burden to prove disqualifying misconduct, including, excessive unexcused absenteeism. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism.

There is very little disagreement between the parties as to the facts here. The claimant was absent on February 22, 23, and 24, 2006 for personal illness but did not report any of those absences to the employer. The employer has a policy in its employee guidelines book, a copy of which the claimant received and for which he signed an acknowledgement, requiring that an employee call in every day of his absence. The claimant did not do so. The claimant credibly testified that he did not realize he had to call in every day because he was absent for the same illness on February 20, 2006 and had properly reported that absence. The claimant could not

recall whether he had said anything at that time about other absences. The claimant was off work on February 21, 2006 and although he was still ill, the claimant did not call the employer because he was not scheduled to work that day. There is no evidence of any other absences on the part of the claimant that were not for reasonable cause or personal illness and not properly reported. In fact, the employer's witness, Kathleen Brunk, Staff Accountant, testified that the claimant had no other absences that were unexcused. The claimant also received no warnings or disciplines for his attendance. The issue here is whether three such absences for personal illness but not properly reported, under the circumstances here, establish excessive unexcused absenteeism. The administrative law judge concludes that they do not. The administrative law judge concludes that the claimant had some explanation for not notifying the employer of the three consecutive absences. The claimant testified that he did not realize he had to do so because he had called in a prior absence. There is no dispute that the claimant was absent for personal illness. On the record here, the administrative law judge concludes that the claimant's absences were for personal illness and he was justified in not properly reporting them. The claimant had no other unexcused absences nor had he ever received any warnings or disciplines for his attendance. Even assuming that the claimant was not justified in reporting the absences, there were only three absences, which the claimant did not properly report. In general, three unexcused absences or tardies are required to establish excessive unexcused absenteeism. See Clark v. Iowa Department of Job Service, 317 N.W.2d 517 (Iowa App. 1982). Here, the claimant, at most, had three. This is a slim record upon which to disqualify the claimant from unemployment insurance benefits when he had no other unexcused absences and had never received any warnings or disciplines for his attendance.

In summary, the administrative law judge concludes that the claimant's absences were not excessive unexcused absenteeism and not disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct, to support a disqualification from unemployment insurance benefits, must be substantial in nature. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of April 24, 2006, reference 01, is reversed. The claimant, Steven J. Anderson, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

pjs/pjs